

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001261-MR

THE ESTATE OF JOSEPH GILLIAM
BY AND THROUGH ITS ADMINISTRATOR,
DIANA GILLIAM

APPELLANT

v. APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN CONRAD, JUDGE
ACTION NO. 16-CI-00285

CORRECTCARE-INTEGRATED
HEALTH, INC.

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

LAMBERT, D., JUDGE: This is an appeal from an Oldham Circuit Court order dismissing a wrongful death claim as barred by the applicable statute of limitations. After review, we find no reversible error and affirm the judgment.

I. BACKGROUND

Joseph Gilliam died in October 2011. He had kidney cancer, which was diagnosed while he was an inmate at the Kentucky State Reformatory in LaGrange, Kentucky. Complications from that disease caused his death.

Following his death, Joseph's estate (the Estate) brought a negligence action against the Kentucky Department of Corrections (KDOC). According to the Estate, the KDOC failed to timely arrange for Joseph to have a tumor on his kidney removed. This was a delay, the Estate claimed, that aggravated Joseph's condition and ultimately led to his death. The matter was contested before the Kentucky Board of Claims, and a final hearing was held in May 2015.

More than one year after the final hearing, the Estate filed a separate action in the Oldham Circuit Court. This time, the Estate sued appellee, CorrectCare-Integrated Health, Inc. (CorrectCare), alleging wrongful death. As outlined in the complaint, CorrectCare was a private health care contractor responsible for scheduling Joseph's kidney surgery on behalf of the KDOC.

A few months later, CorrectCare moved to dismiss the Estate's suit. CorrectCare's argument in support of the motion was that the statute of limitations period had run on the wrongful death claim. After receiving no response from the Estate, the circuit court accepted CorrectCare's argument and dismissed the action. This appeal followed.

II. STANDARD OF REVIEW

Appellate review of trial court's dismissal for failure to state a claim is a purely legal exercise conducted under the *de novo* standard. *Morgan v. Bird*, 289 S.W.3d 222, 226 (Ky. App. 2009). The material facts of the case are admitted as true, and the pleadings are liberally construed in a light that most favors the plaintiff. *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

III. DISCUSSION

On appeal, the Estate argues that the circuit court committed a procedural error by allowing CorrectCare to raise a statute of limitations defense in a CR¹ 12.02(f) motion. The Estate also argues, for the first time, that the statute of limitations did not lapse, but should have been tolled as a matter of equity. For the following reasons, we disagree.

Claims for personal injury and for medical negligence must be brought within one year. KRS 413.140. However, if an injured person dies before the expiration of that one year, the decedent's personal representative may bring the claim within one year from his date of qualification. KRS 413.180(1). Two years from the date of death is the latest the personal representative can file a wrongful death claim. *See Everley v. Wright*, 872 S.W.2d 95, 97 (Ky. App. 1993). This is because courts deem the last day of the one-year period provided in KRS 413.140 as the effective qualification date, in the event more than one year passes between the death and the day his personal representative is qualified. KRS 413.180(2).

¹ Kentucky Rules of Civil Procedure.

Here, the court properly considered CorrectCare's CR 12.02(f) motion. Unlike a CR 8.03 pleading, which requires a preceding pleading, a CR 12.02(f) *motion* may be made "at the option of the pleader." CR 12.02. The court also properly evaluated the Estate's complaint in light of the aforementioned standard of review. The complaint, which was filed on May 31, 2016, expressly stated that Joseph died on October 9, 2011.

Rather than file a timely action, the Estate now argues that the statute of limitations should have been tolled because it did not find out about CorrectCare's involvement in the case until the final hearing before the Board of Claims. Even if we were to consider this unpreserved argument, no palpable error is implicated because there is no allegation, much less a colorable one, of fraud, concealment, or misrepresentation by CorrectCare as to its role in Gilliam's injuries. Without such an allegation, "the discovery rule does not operate to toll the statute of limitations to allow an injured plaintiff to discover the identity of the wrongdoer[.]" *McLain v. Dana Corp.*, 16 S.W.3d 320, 326 (Ky. App. 1999). Instead, "[a] person who has knowledge of an injury is put on 'notice to investigate' and discover, within the statutory time constraints, the identity of the tortfeasor." *Id.*

The Oldham Circuit Court's judgment is affirmed.

ALL CONCUR.

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